

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 14, 2006 Session

JANE KAY LOVELL v. KEVIN WAYNE LOVELL

**A Direct Appeal from the Circuit Court for Davidson County
No. 05D-2032 The Honorable Muriel Robinson, Judge**

No. M2005-02955-COA-R3-CV - Filed on January 4, 2007

This is a dependency and neglect case. Based upon the Mother/Appellant's alleged sexual relationship with her minor nephew by marriage, both the juvenile court and the reviewing circuit court found the Mother/Appellant's own minor child to be dependent and neglected under T.C.A. § 37-1-102(b)(12)(B), (F), and (G). Mother/Appellant appeals. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and FRANK G. CLEMENT, JR., J., joined.

Vicky V. Klein of Madison, Tennessee for Appellant, Jane Kay Lovell

James Robin McKinney, Jr., of Nashville, Tennessee for Appellee, Kevin Lovell

OPINION

Kevin Wayne Lovell ("Appellee") and Jane Kay Lovell ("Appellant") were divorced on March 9, 2004 by Final Decree of the Circuit Court at Davidson County, Tennessee. Included in the Final Decree as part of the Marital Dissolution Agreement was the Permanent Parenting Plan, which provided that the parties' minor child, M. L. (d.o.b. 3/1/97), would reside with Ms. Lovell and that Mr. Lovell would have visitation on alternate weekends, alternate holidays, and two weeks during the summer.

Prior to the entry of the Final Decree, the Department of Children's Services ("DCS") began an investigation of Ms. Lovell regarding a possible sexual relationship with a minor, B.H. (d.o.b.

12/31/87), who is Ms. Lovell's nephew by marriage.¹ During the course of the investigation, on May 5, 2005, Ms. Lovell was summoned for an interview with DCS. While at that meeting, Ms. Lovell entered into a Safety Agreement with DCS, which agreement placed M.L. with the maternal grandmother. However, the agreement did not remove any of Ms. Lovell's responsibilities with respect to M.L., nor did it remove her decision-making authority as granted by the Final Decree of Divorce. By its own terms, the Safety Agreement would either be modified on or before July 6, 2004, or would expire on that date.

On May 10, 2004, a Petition for Dependency and Neglect was filed in the Juvenile Court for Davidson County on behalf of Mr. Lovell. By his petition, Mr. Lovell sought to have M.L. declared dependent and neglected as defined by the statute, and sought permanent custody of the child. Mr. Lovell asserted that M.L. was "at a substantial risk of harm due to Mother's potential arrest and her sexual activities [with B.H.]." On May 20, 2004, DCS filed a Long Term Petition to Adjudicate Dependency and Neglect, which sought ratification of the May 4, 2004 Safety Agreement, but not removal of the child. A preliminary hearing on both Mr. Lovell's Petition for Dependency and Neglect and DCS's Long Term Petition to Adjudicate Dependency and Neglect was held on June 1, 2004. Although Ms. Lovell testified at this hearing, because of the pending criminal investigation, she asserted her Fifth Amendment rights throughout most of the proceedings. At the hearing, the Referee appointed a Guardian ad Litem for M.L., and transferred custody to Mr. Lovell. The Referee also found that "the mother has admitted previously to having an inappropriate sexual relationship with a minor."

A hearing before the Juvenile Court Judge was scheduled for December 21, 2004. On August 30, 2004, Ms. Lovell was indicted for alleged misconduct relating to B. H., which conduct allegedly occurred between December 31, 2001 (when B. H. was 13 years old) and March 1, 2004, *see* fn. 1 *supra*.

On April 19, 2005, an "Agreed Order of Adjudication and Disposition" was entered by the Juvenile Court finding that M.L. was a dependent/neglected child pursuant to T.C.A. § 37-1-102(b)(12)(B), (F), and (G), granting the petitions of Mr. Lovell and DCS, requiring M.L. to remain in counseling until the therapist decided it proper to end treatment, continuing custody with Mr. Lovell and requiring visitation with Ms. Lovell to remain supervised. An "Amended Order of Adjudication and Disposition" was entered on May 27, 2005. In both of these Orders, the court found, in relevant part, as follows:

By Jane Lovell's own admission, by clear and convincing evidence, the Court finds that this inappropriate relationship [between Jane Lovell and B.H.] did occur and that this comprises a severe lapse in

¹ The investigation began after B.H.'s mother tape recorded conversations with Ms. Lovell, in which Ms. Lovell allegedly admitted to a sexual relationship with B.H. An eight-count indictment was returned against Ms. Lovell. Counts one through four were for statutory rape; counts five through eight were for incest. The criminal matter proceeded to trial; however, the indictment was dismissed during the course of that proceeding.

judgment and calls into serious question Jane Lovell's fitness to care for [M.L.] in that she is emotionally unable to make rational decisions because of her behaviors with the minor child, B.H.

On October 5, 2005, Ms. Lovell appealed the ruling of the Juvenile Court to the Circuit Court at Davidson County. Following a *de novo* hearing, on November 15, 2005, the Circuit Court entered an Order affirming the ruling of the Juvenile Court. Ms. Lovell appeals and raises one issue for review as stated in her brief:

The finding by the trial court that [M.L.] is a dependent and neglected child as defined in T.C.A. § 37-1-102(b)(12)(B), (F) & (G) is not supported by the record.

T.C.A. § 37-1-102(b)(12) (2005) defines a "dependent and neglected child," in relevant part, as a child:

(B) Whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity is unfit to properly care for such child;

* * *

(F) Who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of such child or others;

* * *

(G) Who is suffering from abuse or neglect;

A finding of dependency and neglect must be based upon clear and convincing evidence. T.C.A. § 37-1-129(c) (2005). Our review, however, is *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm absent error of law. *See* Tenn. R. App. P. 13(d). As this Court discussed in *In re: H.A.L.*, No. M2005-00045-COA-R3-PT, 2005 WL 954866 (Tenn. Ct. App. April 25, 2005) no appl. perm. appeal filed:

These decisions draw a distinction between specific facts and the combined weight of these facts. Tenn. R.App. P. 13(d) requires us to defer to the trial court's specific findings of fact as long as they are supported by a preponderance of the evidence. However, we are the ones who must then determine whether the combined weight of these facts provides clear and convincing evidence supporting the trial

court's ultimate factual conclusion. The Tennessee Supreme Court used this approach in *In re Valentine* when it recognized the difference between the conclusion that a biological parent had not complied substantially with her obligations in a permanency plan and the facts relied upon by the trial court to support this conclusion. *In re Valentine*, 79 S.W.3d at 548-49; *see also Jones v. Garrett*, 92 S.W.3d at 838-39.

Id. at *4 n. 10.

Furthermore, when the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the witnesses in their manner and demeanor while testifying is in a far better position than this Court to decide those issues. *See McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn.1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn.Ct.App.1997). The weight, faith, and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. *See id.*; *see also Walton v. Young*, 950 S.W. 2d 956, 959 (Tenn.1997).

At the October 5, 2005 hearing in this matter, the trial court made the following, relevant, rulings from the bench following the close of all proof:

First of all, I'm going to make a finding having heard the testimony of the witnesses, having had the privilege as a trial Judge to actually view these witnesses as they testify....

And this is my finding in this regard: Ms. Jane Lovell, the mother of the child that's alleged to be Dependent Neglect, [M.L.] is not a credible witness. Her actions are not appropriate for a 30 year old woman. More particularly, she's used the phrase throughout her testimony, "not to my knowledge." That was her answer to questions that a prudent person would either have a yes or no answer or would give a trial Judge an explanation, because they were so graphic or meaningful in the testimony that a person would know whether they said this or whether it happened.

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She's [Ms. Lovell] arrogant, she attempts to rationalize her conduct with this minor [B.H.], and she has demonstrated to this Court through her testimony that she doesn't have any perception of right or wrong, and she is a grown woman.

She has attempted throughout this trial to rationalize her situation with this child with statements and conclusions about her actions that are absolutely absurd to this Court. An example, wearing coded clothes to a ball game where this alleged abused child is going to be there or she said she hoped he would be there, doesn't make sense to me. It's very, very damaging to her case.

And she admits to wearing these clothes with the coded messages to the very minor child that she's accused of having an inappropriate sexual relationship with, the very same child wherein criminal charges arose, and she was indicted for rape of a child. I mean, a prudent person wouldn't go anywhere near this child, much less wear a message on their clothes to convey some kind of communication to this child. So, I really don't know what she's thinking.

She caused this whole situation. She is the parent who has caused [M.L.'s] problems....

She has sat on this witness stand and given me the most egregious testimony as to why she justifies her act. I have never heard the like as a trial judge. I have to look to the best moral atmosphere provided by a parent. That is certainly not being provided by the mother, and at this time, I do find that [M.L.] is a Dependent Neglected child, and that all the rulings down in Juvenile Court were appropriate, and this Court so finds.

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...I [the Court] truly feel the evidence shows she's [Ms. Lovell] contemplating marriage [to B.H.], and he's [B.H.] not an adult yet. And so, it kind of goes from bad to worse, and the testimony and witnesses that she's present[ed] to this Court.

[Ms. Lovell] didn't present any witness other than herself, which is a little amazing to me, but I don't know, based on what she's given me, this is the only ruling that I could possibly conclude after the entry of the evidence....

Turning to the record in this case, we note that Ms. Lovell adamantly denied having had a sexual (or otherwise inappropriate) relationship with B.H. However, as set out above, the trial court made a specific finding that Ms. Lovell was not a credible witness. Any credibility determinations made by the trier of fact will be given great weight by this Court. *See, e.g., Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn.Ct.App.1997). Notwithstanding Ms. Lovell's denial of any untoward

conduct with B. H., she does admit to wearing coded clothing to the ball park in order to convey some secret message to B. H., to wit:

Q [to Ms. Lovell]. Okay. Did you ever put on clothing with a symbol or a message on your clothing to indicate to B. H. that you loved him?

A. I had something on, yes.

Q. Okay. And what was that--what did you wear [] that indicated that it was a message to B. H.?

A. I have a shirt.

Q. And what did that shirt say?

A. AMHSB.

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Q. What does that mean?

A. It stands for "all my heart, soul, and body."

Although Ms. Lovell contends that the message "all my heart, soul, and body" was merely a sign of support and platonic love for B. H., this Court, like the trial court, finds Ms. Lovell's motive to be more prurient than pure. Despite Ms. Lovell's protestation that her relationship with B. H. Hall was not sexual, there is, nevertheless, something troubling in the way Ms. Lovell talks about her interaction with B. H.. Despite the age difference (B. H. is fourteen years Ms. Lovell's junior), she states that B. H. is "her best friend." She also admits to lying on sofas and beds with B. H. while the two watched television, to "snuggling," "hugging," and "kissing" the minor, while all the time asserting that this is normal behavior for a thirty year old woman and a sixteen year old boy. It is not. Rather, the evidence in the record clearly demonstrates that Ms. Lovell has trouble distinguishing between right and wrong in terms of her dealings with this nephew. Furthermore, the fact that Ms. Lovell carried on certain activities (such as wearing coded clothing) during the time period in which criminal charges related to B. H. were looming over her demonstrates a lack of decision making that raises serious questions as to her own moral compass as well as her ability to ensure the moral health of her son.

On appeal, Ms. Lovell contends that the evidence cannot support a finding a dependency and neglect because there is no evidence that any of her activities had any negative impact on M.L.. Although we concede that the evidence in record suggests that M.L. is a well adjusted boy, he did confide to DCS that he had witnessed his mother and B. H. snuggling and hugging on the couch. We find nothing in the statutory definition of a dependent and neglected child (as applied in this

case) that requires actual harm to occur before such finding may be established. Rather, T.C.A. § 37-1-102(b)(12)(B) looks to the parent or guardian's behavior ("Whose ***parent, guardian, or person with whom the child lives*** by reason of ...immorality or depravity is unfit to properly care for the child), and T.C.A. § 37-1-102(b)(12)(F) requires only that the morals or health of the child be endangered, as opposed to actually compromised ("Who is...under such improper guardianship or control as to injure ***or endanger the morals*** or health of the child....). Based upon the record before us, and the totality of the circumstances in this case, we find that the trial court's determination that M.L. is a dependent and neglected child under T.C.A. § 37-1-102(b)(12)(B), and (F) is supported by clear and convincing evidence.

For the foregoing reasons, we affirm the Order of the trial court. Costs of this appeal are assessed to the Appellant, Jane Kay Lovell, and her surety.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.